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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1000

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
A Foreign Corporation, *Petitioner*,

v.

ADA SMOOT, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

LOUIS M. DENIT,
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INDEX.

Subject Index.

	Page
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Summary Statement of Matters Involved	2
Reasons for Granting the Writ	4
Point I	5
(a) As to Defense Relied Upon	5
(b) Jurisdiction of Illinois Court to Vacate Own Judgment	6
Point II	8
Point III	9

Table of Cases.

Baker v. Redd, 44 Ia. 179	6
Beall v. Carpenter, 235 Fed. 272	8
Blake v. Forman Bros. etc., 218 Fed. 264	8
Cage v. Cassidy, 64 U. S. 109, 16 L. Ed. 430	6
Dew v. Hamilton, 22 Ga. 414	6
Dickey v. Turner, 49 F. (2d) 998	7
Dunlap v. Stetson, 4 Mason 349, Fed. Case No. 4164	7
Dunn v. Clark, 8 Pet. 1, 8 L. Ed. 845	7
Franz v. Buder, 11 Fed. 854	8
Green v. Brophy, 71 App. D. C. 299, 110 F. (2d) 539	8
Hanna v. Brictson Mfg. Co., 62 F. (2d) 139	7
Higgins v. California Prune etc. Co., 282 Fed. 550	7
Hitner v. Suckley, Fed. Case No. 6543	7
Jones v. Rutherford, 25 App. D. C. 114	8
Kelley v. Kriess, 68 Cal. 210, 9 Pac. 129	6
Merriam Co. v. Saalfield, 241 U. S. 22, 60 L. Ed. 868	7
Morgenthau v. Fidelity & Deposit Co., 68 App. D. C. 163, 94 F. (2d) 632	8
Odell v. Boyden, 150 Fed. 731	8
Roberts v. Miles, 12 Mich. 297	6
Spellman v. Sullivan, 43 F. (2d) 762	8
Union Bank of Georgetown v. Geary, 5 Pet. 99, 8 L. Ed. 60	6

Statutes.

Judicial Code Section 240(a), (28 U. S. C. 347 (a))	2

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Indemnity Insurance Company of North America, a corporation, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above cause on December 17, 1945.

OPINIONS BELOW.

The trial court filed no written opinion. The opinion of the United States Court of Appeals for the District of Columbia, (R. 25-30), has not yet been officially reported, but is reported in 152 F. (2d) 667.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered December 17, 1945. A petition for rehearing was seasonably filed, and the same was denied on January 11, 1946. (R. 32).

The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended, 28 U. S. C. Sec. 347(a).

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

On September 16, 1944, respondent filed a civil action in the District Court of the United States for the District of Columbia on a judgment entered against petitioner in the Circuit Court of Vermilion County, Illinois, on October 5, 1932, for Seven thousand nine hundred ninety-three dollars and seventy-five cents ($7,993.75), together with interest and costs. (R. 2).

In its answer to this action, petitioner admitted that the Illinois judgment had been entered, but alleged that it was unenforceable by reason of an agreement made between it and the respondent under the following circumstances, set forth in the answer: In June, 1931, respondent recovered a judgment in said Circuit Court against A. G. Hollingsworth for damages alleged to have been sustained by her as the result of negligence in the operation of his automobile. At the time of the occurrence, Hollingsworth held a policy of insurance issued to him by Fort Dearborn Insurance Company, which required in part that he furnish acceptable appeal bond should his insurance company con-

sider an appeal necessary. Hollingsworth was without means to obtain the required bond. His lawyers agreed to become indemnitors to petitioner, upon the understanding and agreement that respondent's lawyers would in turn indemnify them, respondent agreeing, in consideration thereof, not to enforce the bond. Pursuant to such understanding and agreement, petitioner executed the bond, the sole purpose thereof being to enable respondent to collect her judgment from Hollingsworth's insurance carrier. The judgment against Hollingsworth was affirmed on appeal, and thereafter, *as part of the plan and agreement to collect from his insurance carrier,* an action was filed on the bond, which resulted in the judgment. (R. 3-6). Relying upon the agreement and representations of respondent, petitioner did not contest the suit and judgment was entered October 5, 1932, or approximately twelve years prior to the filing of the civil action in the District of Columbia. (R. 2). Hollingsworth's insurance carrier went into receivership and nothing was collected from it. (R. 5). Since the entry of the judgment on October 5, 1932, one of the petitioner's indemnitors died and his estate was administered. (R. 5, 6). While petitioner has been engaged continuously in business in Vermilion County, Illinois, where the judgment was entered, and has had an agent in said County upon whom process might be served, no demand was ever made upon it for payment of the judgment, and no execution was ever issued thereon. (R. 6). Upon these facts, petitioner insisted respondent was without right to maintain her suit. (R. 6).

Respondent did not deny any of the allegations of the answer, but filed a motion for judgment on the pleadings. (R. 7). While said motion was pending in the District of Columbia, a suit in equity was filed in the Circuit Court of Vermilion County, Illinois, to vacate and set aside the judgment here relied upon, to declare the same to be void and of no force and effect, and to expunge it from the records of said Court. (R. 8-14). Respondent had notice of said

suit, and filed a motion in this cause to restrain and enjoin petitioner from proceeding in the State of Illinois, making a copy of the complaint in the Illinois proceeding a part of her motion. (R. 8-14).

On January 29, 1945, the District Court granted respondent's motion for judgment on the pleadings and entered judgment against petitioner for the amount claimed. (R. 15). It also entered a separate judgment restraining petitioner from proceeding in the equity case in the Illinois Court and restraining it from recognizing or honoring any judgment that might be entered therein insofar as such judgment might interfere with respondent's rights in the District Court action. (R. 15, 16). Petitioner noted an appeal from both judgments. On February 6, 1945, the Circuit Court of Vermilion County, Illinois, decreed that respondent's judgment against this petitioner was null and void, and of no force and effect, and accordingly set the same aside, and directed that it be cancelled and expunged of record. (R. 18-23). A certified copy of this decree was filed in the United States Court of Appeals for the District of Columbia and was treated as part of the record on appeal. (R. 27).

The United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 25-29) on two grounds, (1) that petitioner's allegations of an agreement *"limiting liability . . . did not raise matters into which the District Court was obliged to inquire,"* and (2) that the subsequent decree of the Illinois Court was void because that Court had no jurisdiction in the equity proceeding. (R. 26-28). It reversed the order granting an injunction. (R. 30).

REASONS FOR GRANTING THE WRIT.

I. The decision below fails to give proper effect to applicable decisions of this court and decisions in other circuits, and is in conflict therewith on two fundamental principles of law which are of general importance, namely:

(a) It erroneously holds that where an action is brought upon a foreign judgment, the defense that the judgment was suffered to be entered in reliance upon a promise of the plaintiff not to enforce it is unavailable, because such a defense amounts to a collateral attack upon the judgment.

(b) It erroneously holds that a court has no jurisdiction to vacate and set aside its own judgment upon application of an aggrieved or defrauded party unless personal service upon the judgment creditor is effected.

II. The decision below is contrary to and inconsistent with decisions of federal and state courts upon a question of general importance, in that it holds that a judgment is not a res sufficient to sustain the in rem or quasi in rem jurisdiction of equity.

III. The decision below so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, in that a judgment was entered without a trial, although, on the pleadings, it was clear that such action would countenance a fraud by respondent upon this petitioner.

POINT I.

The United States Court of Appeals for the District of Columbia has not Given Effect to Applicable Decisions of this Court and is in Conflict Therewith and with Decisions of Other Circuits.

(a) *As to Defense Relied Upon.*

Petitioner's answer raised a substantial issue of fact, namely, was there an agreement not to enforce liability? Sufficiently strong reasons for such an agreement were given. Respondent's ability to collect her judgment in the damage suit depended upon holding the insurance carrier. (R. 3, 4). Respondent knew this. Accordingly, she agreed to the form of indemnity arrangement negotiated by her attorneys. (R. 4, 5). They assumed a personal liability in

order to aid her. (R. 4). Her inaction for a period of twelve years is explainable only upon the theory that there was such an agreement. Upon this issue, as to whether she did agree, petitioner was clearly entitled to a trial. This right was denied by the District Court. No reasons were assigned and the basis of its decisions is a matter of conjecture. In affirming, the Court of Appeals held that this defense could have been set up in the original proceedings, and, therefore, could not be asserted here, in what it erroneously determined was a collateral attack. (R. 26). This reasoning is based upon a misconception of the defense. Part of the arrangement and agreement with respondent was that petitioner would suffer judgment to be entered. Manifestly, therefore, it could not have resisted the entry of judgment. The agreement not to enforce liability could be relied upon only when respondent violated it. This occurred when the present action was filed. Then, and not until then, could her agreement be pleaded. Accordingly, the defense relied on here could not have been asserted prior to the judgment or in the original proceedings leading up to it.

This Court has held that an agreement of the character here asserted is valid and enforceable and that affirmative relief against threatened or actual violations thereof will be granted.

> *Union Bank of Georgetown* v. *Geary*, 5 Pet. 99, 8 L. Ed. 60.
> *Cage* v. *Cassidy*, 64 U. S. 109, 16 L. Ed. 430.

Similar agreements have been recognized and held enforceable elsewhere.

> *Kelley* v. *Kriess*, 68 Cal. 210, 9 Pac. 129.
> *Roberts* v. *Miles*, 12 Mich. 297.
> *Baker* v. *Redd*, 44 Ia. 179.
> *Dew* v. *Hamilton*, 23 Ga. 414.

(b) *Jurisdiction of Illinois Court to Vacate Own Judgment.*

The judgment upon which this action was brought was entered by the Circuit Court of Vermilion County, Illinois,

in 1932. (R. 2). After the judgment in the District Court, but before the decision of the Court of Appeals, the Illinois Court entered a decree holding its prior judgment to be void and of no effect and directing that it be cancelled and expunged from record. (R. 18, 23). This decree was a part of the record on appeal. The Court of Appeals declined to recognize it, saying that "the decree * * * shows clearly and unmistakably on its face that that court had no jurisdiction * * * ". (R. 27). This holding was based on the theory that the Illinois proceeding was strictly in personam, inasmuch as respondent had no property in Illinois which would have constituted ground for an in rem proceeding, and that service on respondent by publication was insufficient to give jurisdiction for the subsequent decree. (R. 27). The Court of Appeals completely overlooked the established rule that a suit in equity for relief against a judgment at law is not a new proceeding, but is a continuation of and ancillary to the original action, and that in such a case substituted service of process is sufficient. In this aspect, we submit, the decision is in conflict with decisions of this Court and of other circuits.

Dunn v. *Clark*, 8 Pet. 1, 8 L. Ed. 845.
Merriam Co. v. *Saalfield*, 241 U. S. 22, 60 L. Ed. 868.
Dunlap v. *Stetson*, 4 Mason 349, Fed. Case No. 4164.
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Dickey v. *Turner*, 49 F. (2d) 998.
Hitner v. *Suckley*, Fed. Case No. 6543.

The substituted service usually allowed has been upon the attorney who represented the party in the original law action. Here, however, respondent's attorney in the original law suit was one of the parties plaintiff in the suit to set aside the judgment. (R. 18, 20). Respondent was, therefore, served by publication and received actual notice of the proceeding. (R. 8, 19).

Were such jurisdiction not recognized in our courts of equity, a defendant against whom a fraudulent judgment

was obtained would be without remedy as soon as the defrauding plaintiff removed from the state.

POINT II.

Illinois Judgment a Res Supporting Jurisdiction.

In the proceeding to vacate, the Illinois Court held there was a *res* within its jurisdiction, namely, the 1932 judgment. (R. 18). The Court of Appeals held this was insufficient to confer jurisdiction, and that in the absence of personal service of process, the Illinois decree was invalid. Although we have found no case in this Court expressly deciding that a judgment is a *res*, it would seem clear by analogy to be property in both the legal and ordinary meaning of that word. Numerous decisions in the District of Columbia and elsewhere have sustained the proposition that evidence of a debt or claim is a *res* which will support the *in rem* or quasi *in rem* jurisdiction of equity.

Jones v. *Rutherford*, 25 App. D. C. 114.
Morgenthau v. *Fidelity & Deposit Co.*, 68 App. D. C. 163; 94 F. (2d) 632.
Green v. *Brophy*, 71 App. D. C. 299; 110 Fed. (2d) 539.
Odell v. *Boyden*, 150 Fed. 731.
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Beall v. *Carpenter*, 235 Fed. 272.
Franz v. *Buder*, 11 Fed. 854.
Spellman v. *Sullivan*, 43 F. (2d) 762.

If, as the foregoing cases show, a chose in action may be the basis for exerting jurisdiction in rem, or quasi in rem, then we submit that the dockets and record books of the Illinois court were no less sufficient. This is what the Illinois Court held, and we submit that its decision has support in principle in the cases cited, which are a few among many.

POINT III.

Departure from Accepted and Usual Procedure.

In sustaining the judgment of the District Court the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings. Petitioner tendered a defense which raised an issue of fact. Upon that issue, in accordance with the usual course of procedure, it was entitled to a trial. Without pausing to make any inquiry into the facts, the trial court entered judgment on the pleadings, and this, notwithstanding the fact that for the purposes of the motion for judgment the allegations of the answer were admitted. The result is that petitioner was denied any opportunity to make a defense, even though, if what it claims is established, a recovery by the respondent is a clear violation of her agreement and a wrongful abuse of the Illinois judgment, which was entered without contest in reliance upon such agreement.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8991, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, *Appellant* v. ADA SMOOT, *Appellee*, and that the judgment therein of said United States Court of Appeals for the District of Columbia be reversed by this Honorable Court, and that your petitioner may have such other and

further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

By: LOUIS M. DENIT,
A. LECKIE COX,
THOMAS S. JACKSON,
Counsel for Petitioner.

BRANDENBURG & BRANDENBURG,
Of Counsel.

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BRIEF OF RESPONDENT.

STANLEY H. KAMEROW,
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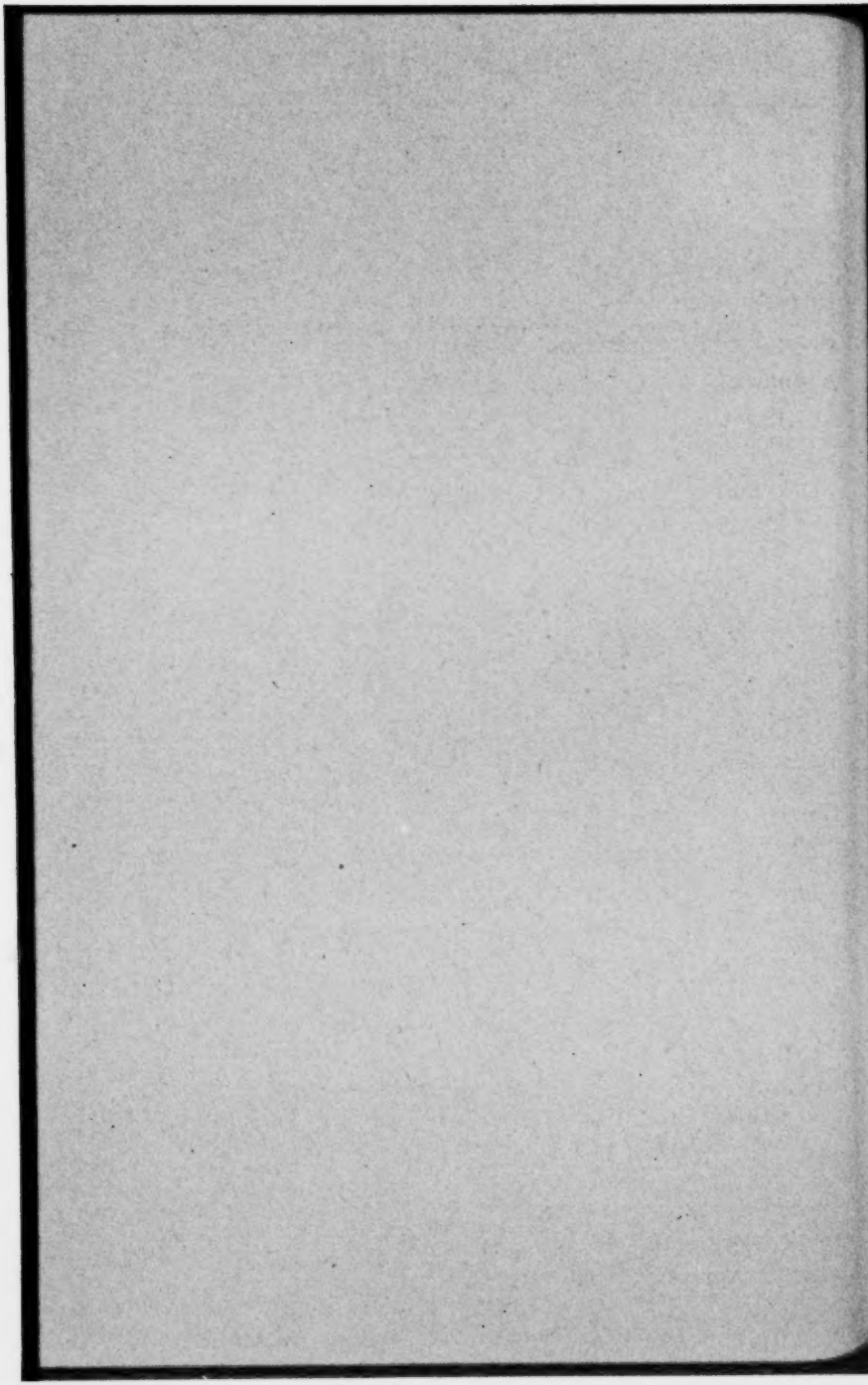

INDEX.

Subject Index.

	Page
Introduction	1
Summary of Argument	2
Argument	3
Point I	3
Point II	4
Point III	4
Point IV	5
Point V	6
The Bank of Georgetown Case	6
Conclusion	7

Table of Cases.

Andas v. Highland Ect. Co., 205 Fed. 862	4
Backus Portable Steamheater Co. v. Simonds, 2 App. D. C. 290	5
Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740	4
Cage v. Cassidy, 64 U. S. 109, 16 L. Ed. 430	6
Christmas v. Russell, 72 U. S. 290	4
Cromwell v. County of Sac, 94 U. S. 351	3
Elliott v. Peirsol, 1 Pet. 328	4
Moore v. Draft, 179 Fed. 685	4
Pennoyer v. Neff, 95 U. S. 714, 727	5
Steffan v. Zeust, 10 App. D. C. 260	5
Union Bank of Georgetown v. Geary, 5 Pet. 99, 8 L. Ed. 60	6

Statutes.

Code of Laws State of Illinois, Smith-Hurd Ann. St. Ch. 59, Par. 1	6

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BRIEF OF RESPONDENT.

INTRODUCTION.

The Petitioner, Indemnity Insurance Company of North America, in 1931 became the surety on the appeal bond of one Hollingsworth. In 1932 the case which was being appealed by Hollingsworth was affirmed and thereafter in 1932 a judgment in the amount of $7,993.75 with interest and costs from date was entered in the Supreme Court of Vermillion County, Illinois. No appeal was taken from the

entry of this judgment and the same has never been satisfied. Petitioner herein took no steps to set the same aside until January 29, 1945. On September 16, 1944 the respondent filed suit against the petitioner on the Illinois judgment. The District Court granted the respondent's motion for a judgment on the pleadings and the case was thereafter affirmed by the United States Court of Appeals for the District of Columbia.

SUMMARY OF ARGUMENT.

Point I.

The original judgment entered in the Illinois Court, which had competent jurisdiction over the parties, is conclusive not only as to matters which were actually in issue and decided in that suit, but also as to other issues which the parties might have litigated and which might have been decided as incident to or substantially connected with the subject matter of the litigation.

Point II.

The Illinois judgment was not subject to collateral impeachment as long as it remained in force and effect.

Point III.

A suit to set aside a judgment is in personam and service by publication is not sufficient in such a case.

Point IV.

The defense as stated by petitioner, if otherwise admissible, would be against public policy.

Point V.

The defense as stated by petitioner would, if otherwise admissible, be violative of the statute of frauds of the State of Illinois.

ARGUMENT.

As to Point I.

The original judgment entered in the Illinois Court, which had competent jurisdiction over the parties, is conclusive not only as to matters which were actually in issue and decided in that suit, but also as to other issues which the parties might have litigated and which might have been decided as incident to or substantially connected with the subject matter of the litigation.

If there was actually no obligation upon the petitioner to pay the amount claimed in the suit filed in the Illinois Court, then it was the duty of the petitioner to set up this defense in the original Illinois action, and if the petitioner failed to set up the defense it will now be precluded from setting up such a defense which is in effect a collateral attack upon the judgment itself.

Mr. Justice Field speaking for this Court said:

> "It (judgment) is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. *If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed.* The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim

in controversy. Such demand or claim, having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." (Italics supplied.) Cromwell v. County of Sac, 94 U. S. 351.

It is fundamental that in an action on a judgment the original cause of action cannot be examined on the merits, the area of attack being limited to jurisdiction and fraud in procurement.[1]

As to Point II.

The Illinois judgment was not subject to collateral impeachment as long as it remained in force and effect.

The Illinois judgment is in full force and effect. Petitioner has interposed a defense which would, if successful, collaterally attack the judgment of the Illinois Court.

Even if it be assumed that the petitioner's Illinois judgment was voidable, it is not subject to collateral impeachment as long as it remained in force.[2]

As to Point III.

A suit to set aside a judgment is in personam and service by publication is not sufficient in such a case.

The petitioner obtained an order vacating the Illinois judgment after having obtained jurisdiction over the respondent by publication. The Illinois Courts, District of Columbia Courts and this Court have all examined the question raised by the petitioner and all of these courts have held that service by publication is insufficient. The Illinois Courts have specifically held that proceedings involving a judgment are not proceedings in rem, especially where the original judgment is a judgment in personam as in this case. *Bickerdike* v. *Allen*, 157 Ill. 95, 41 N. E. 740, 29 LRA 782. Also see, 126 ALR 664.

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[1] *Christmas* v. *Russell*, 72 U. S. 290; *Moore* v. *Draft*, 179 Fed. 685.

[2] *Elliott* v. *Peirsol*, 1 Pet. 328; *Andas* v. *Highland Ect. Co.*, 205 Fed. 862.

The United States Court of Appeals for the District of Columbia has held that a suit to cancel an assignment of a patent is a suit in personam and not in rem and that personal service of process within the state upon the defendants is necessary to confer jurisdiction upon the Court. *Backus Portable Steamheater Co.* v. *Simonds*, 2 App. D. C. 290.

In *Staffan* v. *Zeust*, 10 App. D. C. 260, the same Court held that an action of ejectment in the District of Columbia is an action in personam and not in rem. That Court also held that a case in settlement of a claim against the Government involved proceedings in personam and not in rem.

In *Bickerdike* v. *Allen*, *supra*, the Illinois Supreme Court quotes with approval the language of Mr. Justice Field in *Pennoyer* v. *Neff*, 95 U. S. 714, 727, wherein it is said:

> "But where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals in one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within are equally unavailing in proceedings to establish his personal liability."

As to Point IV.

The defense as stated by petitioner, if otherwise admissible, would be against public policy.

If the petitioner were permitted to interpose the defense upon which it relies, there would arise a controversy involving facts attempting to go behind a judgment. There must be an end to litigation. If a defense of this type were allowed to stand, there would be no end to litigation and no judgment would be a finality.

As to Point V.

The defense as stated by petitioner would, if otherwise admissible, be violative of the statute of frauds of the State of Illinois.

The Statute of Frauds of the State of Illinois provides as follows:

> "No action shall be brought, whereby to charge—the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person—upon any agreement that is not to be performed, within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." *Smith-Hurd* Ann. St. (Ill.) Ch. 59, ¶1.

It should be noted that nowhere in the record is there any allegation or contention that the agreement relied on by the petitioners was in writing and it must therefore be assumed that petitioner could not make such a showing. Examination of the defense which petitioner attempted to set up will show on its face that it violates the Statute of Frauds of the State of Illinois and that the District Court was fully justified in granting respondent's motion for a judgment.

The Bank of Georgetown Case.

Petitioner relies heavily upon two cases in this Court, *The Union Bank of Georgetown* v. *Geary*, 5 Pet. 99, 8 L. Ed. 60; *Cage* v. *Cassidy*, 64 U. S. 109, 16 L. Ed. 430. These cases are easily and clearly distinguishable from the case at bar. The Court below in its opinion specifically stated (R. p. 26):

> "It is fundamental that in an action on a judgment the original cause of action cannot be examined on the merits, the area of attack being limited to jurisdiction and fraud in procurement."

This statement of the law has not been in any way questioned by the petitioner and is so well settled that no argument can be made concerning the same.

However, an examination of the two cases relied on by the petitioner will show that both of these cases involve *fraud in procurement*, thus squarely come within the exception laid down by the Court below and by this Court in the cases referred to.

The Union Bank of Georgetown case involved facts wherein the defendant had a good and valid defense to the original suit but where the attorney *through fraud* prevented the defendant from having her day in Court. The Cage case involved facts where there was a good defense to the original action but where, because of *fraud*, the defendant was prevented from having his day in Court.

Nowhere in this Court or in the Courts below has the petitioner alleged that the original judgment in Illinois was fraudulently procured and thus the facts come within the well settled rule and follow outside of the only exception to the rule which the Courts have recognized.

CONCLUSION.

It is respectfully submitted that no error has been shown in the court below and that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be denied.

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